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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 21.01.2022

PRONOUNCED ON : 09.02.2022

CORAM

THE HON'BLE MR. JUSTICE G.CHANDRASEKHARAN

S.A.No.776 of 2021

and

C.M.P.No.15134 of 2021

G.Gowri

...Appellant/Defendant

Vs.

N.Rupla

...Respondent/Plaintiff

Prayer:- Second Appeal is filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree dated 29.10.2020 in A.S.No.6 of 2019 passed by the learned District Judge, Cuddalore District, Cuddalore, confirming the judgment and decree dated 14.12.2018 in O.S.No.74 of 2011 passed by the learned I Additional Sub Judge, Cuddalore.

For Appellant : Mr.K.Ashok Kumar

For Respondent : Mr.P.Sureshbabu for caveator

JUDGMENT

The challenge is against the concurrent judgments in a suit filed by the respondent/plaintiff for partition.

2.The case of the respondent is that she is the close friend of the appellant. They started a tailoring mart by name of "Rubala Tailors" in 1996, at Koothapakkam, Cuddalore. They earned more in tailoring mart, and started real estate business and the business of construction. Through these businesses, they earned more profit. They decided to purchase a house and jointly purchased a house on 05.11.2009. That is the suit property in this case. Then, they jointly constructed first floor from the profits of their businesses. They were living jointly in the suit property with their children. In January 2011, appellant without any reason drove the respondent from the suit property with the help of rowdies. Respondent is entitled to 1/2 share in the suit property. Therefore, this suit for partition and other reliefs.



3.The appellant filed written statement denying the averments that the suit property was purchased by the respondent and appellant jointly from the profit earned from their business. It is her specific case that she purchased the suit property with her own funds. To avoid income tax, respondent's name was included in the sale deed. Respondent has no means to contribute to the purchase. She was struggling to earn for a livelihood through tailoring business. It is true that appellant and respondent were living in the suit property with their children. Electricity connections in the suit property are in the name of the appellant and respondent. Respondent was paying electricity bill as a friend of the appellant. The building in the suit property was aged 28 years and was damaged. Appellant spent her own money for repairing the building and raising the first floor. Due to some differences of opinion, the respondent is living separately. Appellant also filed an additional written statement claiming that her husband died in a road accident and in M.C.O.P.No.57 of 1999 she was awarded a compensation of Rs.3,80,000/- with subsequent interest. She invested this compensation amount, in addition to her savings, jewels and income from real estate business to purchase the suit property. When she was taking treatment in an hospital on 15.12.2011, the respondent got an agreement and money from her by threat and coercion. The suit is not properly valued and no proper Court fee was paid. The suit is liable to be dismissed.

4.The respondent filed elaborate reply statement reiterating the averments made in the plaint, denying the averments made in the written statement and additional written statement. It is claimed that she had contributed 50% of the amount for purchasing the suit building. There was a compromise during the pendency of the suit and unregistered agreement of sale was entered into between the appellant and respondent on 15.12.2011. As per this agreement the sale price for her share was fixed at Rs.21,25,000/- and she received an advance amount of Rs.10,00,000/-. Thereafter, the appellant has not come forward to execute the sale deed.

5.On the basis of this pleadings, the trial Court framed the following issues,

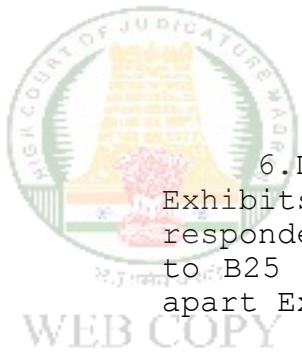
i)Whether the suit property was purchased from the income derived from the businesses run by plaintiff and defendant or it was purchased by the defendant from her independent source of income?

ii)Whether the plaintiff is entitled to $\frac{1}{2}$ share in the suit property?

iii)Whether the plaintiff is entitled for the mesne profits?

iv)Whether the plaintiff is entitled for the relief of permanent injunction prayed for?

v)To what relief, if any, the plaintiff is entitled?



6. During the course of trial, PW1 to PW3 were examined and Exhibits A1 to A11 were marked on the side of the respondent/plaintiff. DW1 and DW2 were examined and Exhibits B1 to B25 were marked on the side of the appellant/defendant. That apart Exhibit C1 was also marked.

7. On considering the oral and documentary evidence, the learned Trial Judge, found that the appellant/defendant has not proved that the suit property was purchased by her independent income and on the other hand it is proved by the respondent that the suit property was purchased by the income from the businesses run by plaintiff and defendant. In this view of the matter, the learned Trial Judge decreed the suit as prayed for. In appeal filed by the appellant, the learned First Appellate Judge did not find any reason to differ from the view taken by the learned Trial Judge and confirmed the judgment of Trial Court by dismissing the appeal. Thus, the appellant is before this Court by way of Second Appeal.

8. At the time of admission of the Second Appeal, following substantial questions of law were framed for consideration,

- a) Is the suit is liable to be dismissed as barred by law under Section 69 of the Indian Partnership Act 1932 (Act 9 of 1932) since the whole claim of the plaintiff is that there was a Partnership Firm in the name of "Rubala Real Estate" and the suit schedule property was purchased arising out of the income derived from the said partnership business?
- b) Whether the suit is bad for non-joinder of necessary party under Order I Rule 9 of the Code of Civil Procedure, 1908, moreso, when the plaintiff relies on such averments?
- c) Can the trial Court entertain such a suit for seeking partition of the property, irrespective of the provision of Order II Rule 3 of the Code of Civil Procedure, 1908, since mere partition cannot be permitted without seeking declaration and possession of the suit property in spite of title of the same, is seriously disputed by the defendant?
- d) Is it correct for the trial Court to entertain such a suit for partition wherein the Court Fee arrived is not inconsonance with Section 37(1) of Tamil Nadu Court Fee and Suit Valuation Act 1955?
- e) Can a Court entertain and grant a legal remedy in such a suit wherein the cause of action arose out of his own illegal activity of the plaintiff, irrespective of the fact that no registration was made effect to the purported partnership firm under Section 59 read with Section 69 of Indian Partnership Act 1932 (Act 9 of 1932) which is also



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- mandatory for carrying out such partnership business?
- f) Whether the trial Court was right in granting such monetary relief when there was no prayer for such relief?
 - g) Can the trial Court accept such an eschewed Chief Examination of PW2 and mark the same as Court Exhibit namely, C2 and also act upon the same even the said PW2 is not subjected to cross examination by Defendant under Section 33 of the Indian Evidence Act, 1872?
 - h) Can the trial Court shift the burden of proof on the defendant since the plaintiff alone come forward with such claim and not the defendant, irrespective of the Settled Doctrine of Evidence "the burden of proof lies upon him who affirms, not upon who denies?
 - i) Whether the Courts below can look into documents which were post institution of the suit and arrive at a conclusion to decree the suit?
 - j) Can the trial Court accept the evidence produced by an interested witness of plaintiff and conclude the case finally since the PW3 is nothing but own brother of the plaintiff in contravention of the Courts of Law?

9. The learned counsel for the appellant submitted that when the respondent claims that both the appellant and respondent were running Rubala Tailors in 1996 followed by engaging in real estate and construction businesses, earned profit out of these businesses, used the profit for the purchase of suit property and construction of first floor, there is absolutely no evidence produced by the respondent to show the running of tailoring business, real estate and construction business. In the absence of any proof regarding the running of these businesses and earning of income, the claim of the respondent that the appellant and respondent were running these businesses in partnership, earned money and purchased the suit property cannot be accepted. When it is claimed by the respondent that the appellant and respondent were running these businesses in partnership, suit filed against one of the partners without registering the partnership and impleading the partnership firm is not maintainable. If there is really a partnership, suit ought to have been filed for dissolution of partnership firm and other relief. The suit for partition cannot be maintained. The suit should have been filed for the relief of declaration and possession.

10. It is further submitted that appellant has produced documents to show that she possessed independent income to deal with the properties. Her evidence that she only contributed money to the purchase of the suit property was supported by PW2.



However, her evidence was unjustly rejected by the Courts below. Courts below have taken note of documents filed by the respondent, that had come into existence after filing the suit. Exhibit A2 sale agreement came to be executed under threat and coercion. Much reliance was placed on this document to base the decision by the Courts below. Both the Courts below without properly considering, especially the documents filed by the appellant, had wrongly decreed the suit. Therefore, the learned counsel for the appellant prayed for setting aside the judgment of the Courts below.

11. Per contra, learned counsel for the respondent submitted that respondent has also produced documents to show that appellant and respondent were doing business jointly in real estate and other businesses and out of income and profit, the suit property was purchased by the appellant and respondent in their joint name. First floor was also constructed using the profit from the businesses. Though the appellant and respondent were doing businesses jointly, it was not strictly a partnership firm as defined under Indian Partnership Act. Therefore, it is not necessary to register their businesses. Respondent was in possession of the suit property and she has forcefully thrown out of the property by the appellant with the help of rowdy elements. Possession of one co-owner is deemed to be the possession of other co-owner. Therefore, the suit was properly valued and the Court fee was paid under Section 37 (2) of Tamil Nadu Court Fees and Suit valuation Act. When Exhibit A1 sale deed clearly shows that the suit property was purchased by the appellant and respondent, appellant is prevented from giving evidence contrary to the recitals in the sale deed. Exhibit A2 sale agreement confirms that appellant admitted respondent's $\frac{1}{2}$ share in the suit property. Both the Courts below have considered these aspects extensively and rightly decreed the suit. Therefore, he prayed for confirming the judgment of the Courts below and for the dismissal of this Second Appeal.

12. Considered rival submissions and perused the records.

13. From the case of the parties, it is clear that appellant and respondent were close friends before dispute started between them. Infact, they lived in same house. It is not in dispute that the suit property under Exhibit A1 was purchased in the names of appellant and respondent. The core issue is as to whether the appellant had alone contributed to the consideration or it was purchased from the profit derived from the joint businesses alleged to have been done by both. It is clearly admitted in the written statement of the appellant that the suit property was purchased in the name of appellant and respondent, they resided in the suit property, though electricity connections are in their name, respondent had also paid



electricity bills etc. Section 91 of Indian Evidence Act deals with exclusion of oral by documentary evidence.

"91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of documents- When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained."

14. As per this Section when disposition of property is reduced to the form of document, no evidence shall be given in proof of the terms of such disposition of property, except the document itself. Section 92 deals with the exclusion of evidence of oral agreement.

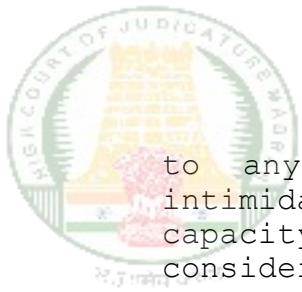
92. Exclusion of evidence of oral agreement.-When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Proviso (1)-Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, 1[want or failure] of consideration, or mistake in fact or law.

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15. When the terms of any disposition of property is reduced to the form of document, no evidence of any oral agreement or statement shall be admitted, for the purpose of contradicting, varying, adding to or subtracting from its terms. There are certain proviso to this Section.

16. Proviso 1 gives an option that any fact may be proved which invalidate the document, or which would entitle any person



to any decree or order relating thereto such as fraud, intimidation, illegality, want to due execution, want of capacity in any contracting party, want or failure of consideration or mistake in fact of law.

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17. However, in the case before hand there is no pleading in the written statement that the respondent exercised fraud or intimidated the appellant or any other grounds exist to invalidate the sale deed. It is admitted in the written statement that the respondent's name was included in the Exhibit A1 sale deed for the reason that she was the friend of appellant and to avoid the payment of income tax. These are not the grounds for invalidating Exhibit A1 sale deed. Therefore, this Court is of the considered view that the appellant has not made out a ground, challenging Exhibit A1 sale deed. This sale deed would clearly prove that the sale deed was purchased by appellant and respondent jointly.

18. It is seen from the oral and documentary evidence produced in this case that respondent has produced Exhibits A1 to A11 documents and appellant has produced Exhibit B1 to B25 documents. Respondent produced these documents to show that she along with the appellant were engaged in real estate business. They purchased suit property in their individual name and joint names and sold it to third parties. Appellant filed the documents in support of her case that, she had independent source of income and with that income she purchased properties and sold it to third parties. The suit was filed on 29.04.2011. From the sale deeds filed by the parties, it is seen that Exhibits A2, A7, B20 to B25 had come into existence after filing of the suit.

19. Exhibits A4, A6 and A7 are the properties purchased in the name of respondent. Exhibit A5 is the sale deed executed by the respondent in favour of one Madhana. Exhibit A8 sale deed is in the name of the appellant and respondent. They jointly purchased the property covered in Exhibit A8. Subsequently, they sold Exhibit A8 property to one vacthala through Exhibit A9. Exhibit A10 is again a property purchased in the name of appellant and respondent. Exhibits B9, B10, B11, B12, B13, B16, B20, B22 and B24 are the sale deeds in favour of the appellant. These sale deeds come into existence from 2001 to 2014. Exhibits B14, B17, B18, B19, B21 and B23 are the sale deeds executed by appellant in her individual capacity or as power agent in favour of third parties. The documents filed by the appellant show that she was engaged in purchase and sale of properties from 2001. As already said some of these documents are after suit documents. Similarly, respondent has also produced the aforesaid documents to show the purchase of properties in her name and in the name of appellant and respondent and the sale effected by her. Thus,



there are evidences to show that both the appellant and respondent were engaged in buying and selling of properties, individually and jointly. But the documents filed by the appellant would not help her case that she contributed the entire sale amount for the purchase of the suit property, in the light of Exhibit A1 sale deed, which shows that the sale was in favour of both appellant and respondent.

20.It is pertinent to refer to the oral evidence produced in this case. Both the appellant and respondent have reiterated their slated position in their evidence.

21.One interesting witness is Tamilarasan. Initially he was examined on the side of the respondent and his proof affidavit was filed. Subsequently, he did not turn up for facing the cross examination and therefore, his evidence was closed. Later he was examined on the side of the appellant as DW2. His evidence now is in total contrast to the proof affidavit filed, when he was examined on the side of the respondent. Therefore, he is un-trust worthy witness and therefore, his evidence cannot be believed.

22.When Exhibit A1 stares at the face of the appellant she cannot give oral evidence against this document, except as provided under Section 92 of the Indian Evidence Act. It is for the appellant to prove that she had alone contributed to the sale consideration and respondent has not contributed. However, the reading of her evidence shows that she admitted that respondent was running Rubala Tailoring Mart and they were living jointly in a house from 1998. She claimed doing money lending business and saree business, which is not pleaded, during her evidence. She admitted the purchase of Exhibit A8 property and selling it to vatchala through Exhibit A9. It is her further admission that using the sale consideration, the suit property was purchased through Exhibit A1. However, she added that, she had contributed additional amount for the purchase of her property. This evidence is sufficient to conclude that both the appellant and respondent purchased Exhibit A8 property in 2003, sold it in 2009 and purchased the suit property using the sale consideration and other source through Exhibit A1. Appellant has miserably failed to establish that she had alone contributed to the purchase of Exhibit A1 suit property. Thus, this Court finds that she cannot claim exclusive right in the suit property through Exhibit A1 sale deed.

23.Much is said about Exhibit A2 sale agreement by the respondent. Though, the execution of this sale agreement was admitted by the appellant, she claimed that she was forced and coerced into executing this sale agreement. In support of her



case, she produced Exhibit B4 discharge summary, Exhibits B5 and B6 hospital receipts and prescriptions and Exhibit B7 police complaint receipt. The perusal of Exhibit B4 discharge summary shows that appellant met with an accident of fell from two wheeler on 12.12.2011 and suffered extensive injuries. She suffered,

- i) Fracture 3 part fracture proximal humerus,
- ii) Compound Bimalleolar fracture dislocation (R) ankle with comminution Lat. Malleolus. Medical aspect of ankle right.
3*2*1cm Gr. II Wound over medial aspect through -
distal tibia projecting out and 4*3 abrasions over medial malleolus region.

24.A surgery was conducted on 14.12.2011 by following the procedure of open reduction and internal fixation. She was discharged only on 21.12.2011. Therefore, claim of the respondent that she had executed Exhibit A2 sale agreement in the Advocate's office cannot be accepted. PW3 states that the sale agreement was executed in the Advocate's office. When appellant was taking treatment as in-patient in Krishna hospital, it is absolutely not possible to execute the sale agreement in Advocate's office. It is submitted by the respondent that during the pendency of the suit, there was a compromise and therefore, Exhibit A2 sale agreement came to be executed. Whatever be the circumstances under this Exhibit A2 came to be executed, the claim of PW3 that Exhibit A2 sale agreement was executed in Advocate's office is falsified by the evidence of appellant and Exhibit B4 discharge summary. Therefore, Exhibit A2 sale agreement cannot be used to support the case of the respondent. As found earlier, even in the absence of Exhibit A2 sale agreement, there is other evidence available, as discussed above, to show that the suit property was purchased by the appellant and respondent jointly. Appellant cannot give any evidence contrary to the terms of sale deed. The only presumption and conclusion that can be drawn on the basis Exhibit A1 sale deed is that both had contributed towards the purchase of the suit property. It is admitted by the appellant that, she and respondent lived jointly in the suit property. It is claimed by the appellant that respondent left on their own. But it is claimed by the respondent that she was thrown out of the suit property by the appellant. Both are co-owners of the suit property and therefore, Court fee paid under Section 37 (2) of Tamil Nadu Court Fees and Suit valuation Act is proper.

25.The learned counsel for the appellant submitted that when it is admitted by the respondent that they were doing the business in partnership, the suit for partition cannot be maintained. It is not the case of the respondent that appellant and respondent had established a partnership firm and were running a partnership firm. It is her case that they jointly did



businesses and the suit property was purchased from the profit made from the businesses run by them. It is apposite to refer Section 6 of the Indian partnership Act, 1932. It reads as follows,

6. Mode of determining existence of partnership.—In determining whether a group of persons is or is not a firm, or whether a person is or is not a partner in a firm, regard shall be had to the real relation between the parties, as shown by all relevant facts taken together.

Explanation 1.—The sharing of profits or of gross returns arising from property by persons holding a joint or common interest in that property does not of itself make such persons partners.

.....

26.Explanation 1 to Section 6 of the Indian Partnership Act makes it clear that sharing of profits or of gross returns by persons holding a joint or common interest in a property, does not make such persons partners.

27.In this case there is evidence to show that the appellant and respondent engaged in real estate business and shared profits/gross returns from the real estate business (properties dealt by them). By mere sharing the profit/gross returns of the properties dealt by them, they cannot be considered as partners in the strict sense of the definition under Indian Partnership Act. There is also no partnership was formed between them as defined under this Act. Moreover, there is no specific pleadings in the written statement that the suit is not maintainable without registering the partnership firm. It is now not open to the appellant to raise this issue in the Second Appeal.

28.It is already found that the suit property was purchased by the appellant and respondent jointly through Exhibit A1 sale deed, they jointly lived there and constructed the first floor and therefore, the respondent is entitled to ½ share in the suit property. Both the Courts have rightly decided the issue and this Court finds no reason to interfere with the findings of the Courts below. For the reasons aforesaid, this Court answers the substantial questions of law as follows. a) and e) In view of the finding that there is no case set up by the respondent/plaintiff that there was a partnership firm in the name of "Rubala Real Estate", this Court finds that the suit is not liable to be dismissed under Section 69 of partnership Act.

b) Issue of non joinder of necessary party was not raised at the earliest possible of opportunity and therefore it cannot be raised now.

c) In view of the reasons stated above, it is not necessary to seek the relief of declaration and possession. It is enough that a partition is claimed.



d) The Court fee was rightly paid under Section 37(2) of Tamil Nadu Court Fees and Suit valuation Act.

f) The trial Court has not granted any money decree, but only directed the respondent to initiate separate proceedings under Order XXII in C.P.C.

g) The trial Court has rightly marked the chief examination of PW2 as Ex.C2 for the purpose of contradiction and corroboration. Exhibit A1 prima-facie proves that the suit property was purchased by appellant and respondent. It is for the appellant to prove that she had alone contributed to the sale consideration. Therefore, the trial Court rightly shifted the burden of proof on the appellant.

i) Both the parties have produced documents that came into existence subsequent to the filing of the suit. However, those documents were not the only source for drawing the conclusion by the Courts below.

j) This Court has now rejected the PW3's evidence with regard to Exhibit A2 sale agreement.

29. In the result, this Court confirms the judgment and decree of the learned First Appellate Judge in A.S.No.6 of 2019 confirming the judgment and decree of the learned I Additional Sub Judge, Cuddalore in O.S.No.74 of 2011 and dismisses this Second Appeal with the costs of the respondent throughout. Consequently, connected miscellaneous petition stands closed.

Sd/-

Assistant Registrar(CS-VIII)

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Sub Assistant Registrar

Ep

To

1. The Principal District Judge,
Cuddalore.

2. The I Additional Subordinate Judge,
Cuddalore.

3. The Section Officer,
VR Section, High Court of Madras.

+1cc to Mr.K.Ashokkumar, Advocate, S.R.No.8264

+1cc to Mr.P.Suresh Babu, Advocate, S.R.No.8290

S.A.No.776 of 2021
and C.M.P.No.15134 of 2021

EV(CO)

RGA(27/04/2022)